IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 474 of 2001
With
CRIMINAL REVISION APPLICATION No. 486 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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ASHOKBHAI CHANDULAL BHATT & ORS
Versus
STATE OF GUJARAT & ANR

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Appearance :
MR SB VAKIL with MR JM PANCHAL and KJ PANCHAL for applicants.
MR AD OZA PUBLIC PROSECUTOR for Respondent State.
MR BM GUPTA for Widow of victim

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

Date : 23 /06/2006

CAV COMMON JUDGMENT

1 These two Criminal Revision Applications are preferred by three accused out of 11 accused of Sessions Case No. 178 of 1986 pending before the learned Additional Sessions Judge, Ahmedabad City, against common order passed by the learned Additional Sessions Judge, Ahmedabad City, on 13th of September, 2001, below Applications Exhibits 56, 57 and 58, dismissing those applications preferred by the accused to discharge them for the offences punishable under Sections 302, 307, 326, 333, 347, 149, 152, 153, 506, 168, 188, 120B of the Indian Penal Code.

2 The factual background reveals that in the month of April, 1985, City of Ahmedabad experienced agitations and riots in certain parts of city on account of Reservation Policy of the then Government and in some parts of city curfew was required to be imposed. The present petitioners and other citizens, leaders of Khadia area of city of Ahmedabad in this connection had preferred writ petitions being Special Criminal Application Nos. 284 to 287 of 1985 complaining about police atrocities and excess of power to the extent of harassment to the innocent citizens by police in Khadia area of the City of Ahmedabad. Pursuant to the said petitions, the Division of this Court (Coram: Mr. Justice B.K. Mehta and Mr. Justice G.T. Nanavati) on 20th of April, 1985, gave directions to appoint a Committee of two members to hold a discreet inquiry into the incidents complained of by the petitioners of those petitions. In

pursuance of the directions of the Division Bench of this Court, namely, the then Joint Registrar Shri A.H. Thakar and the then Additional Registrar Shri B.R. Acharya, in the company of the concerned advocates of the petitioners and the petitioners, etc. visited the affected area of Khadia on 21st of April, 1985 and also on 22nd of April, 1985. On 22nd of April, 1985, between 10.00 a.m. and 11.00 a.m. in protection of Mr. Mahapatra, Deputy Police Commissioner (Southern Zone), Ahmedabad City and police personnel. The Commission appointed by this Court was assessing the damage done to the property of citizens at Brahmpuri Pole of Khadia area at about 2.40 p.m. In other zone of Khadia area i.e. at Pakhalini Pole near Chhabila Hanuman, on relaxation of curfew, a crowd was gathered and that crowd attacked police constables on duty and it is alleged that out of the crowd, accused Kiran Jayantilal (not petitioner herein) attacked police constable Laxmanbhai Jamabhai with gupti and inflicted blows while other accused Vijay Lamba and Paresh Pandurang Dhanokar (both not petitioners herein) attacked Laxmanbhai Jamabhai by cycle chain and they also injured one Home Guard Ratiram Manruram Yadav. It is the prosecution case that the present petitioners i.e. original accused Nos. 1, 4 and 8 were in the said crowd and were instigating the crowd to attack police and to take revenge. Head Constable Laxmanbhai was taken to the hospital, but died and thereafter at about 13.15 hours. Mr. Mahapatra, Deputy Police Commissioner (Southern Zone), Ahmedabad, preferred a complaint (FIR) before

Astodia Police Station and after investigation, the charge sheet came to be filed and the case was committed to the Court of City Sessions Judge at Ahmedabad and was numbered as Sessions Case No. 178 of 1986.

3 It appears that many applications were filed by the accused for producing documents on the record of the case before framing of the charge and it appears that on rejection of some of the applications of the like nature by learned Additional City Sessions Judge, a Revision Application came to be filed in this Court by accused No.6 Nansha C Thakore and accused No.7 Babubhai Methabsing Thakore (both not petitioners herein) being Criminal Revision Application No. 570 of 1986, which was decided by this Court (Coram: Miss Justice R.M. Doshit) on 25th of September, 2000 and this Court held that the Trial Court had grossly erred in refusing to direct production of the document sought for especially inspection report prepared by the Officers of this Court as appointed by the Division Bench of this Court. It was directed that it became the duty of the police to investigate the plea of alibi to find out the truth and ultimately the order refusing production of document was set aside and the learned Trial Judge was directed to order production of inspection report of the Court Committee as referred to above and further directed to consider the plea of the accused in framing of the charge. It appears that without complying this order passed by this Court, the learned Trial Judge straightaway framed

the charge and, therefore, the accused including present petitioners preferred Misc. Criminal Application bearing No. 6684 of 2000. This Court (Coram: Mr . Justice A.K. Trivedi, J.) vide order and judgment dated 15th of November, 2000, was pleased to quash the charge framed against all the accused by the Trial Court and it was directed to the Trial Court that the Trial Court shall comply with the earlier order passed by this Court in Criminal Revision Application No. 570 of 1986. Learned PP had made a statement at the Bar that the said inspection report prepared by the Committee constituted by the Division Bench of this Court would be produced before the Trial Court. This Court, therefore, in Criminal Misc. Application No. 6684 of 2000 further directed that on producing the inspection report by learned PP, the Trial Court shall supply copies of such report to all the accused of Sessions Case No. 178 of 1986, and the accused of Sessions Case No. 178 of 1986 shall be at liberty to make submission in respect of charge and/or to claim discharge on the basis of papers supplied and on the grounds permissible under the law.

4 Thereafter it appears that in all three applications came to be filed by the accused. Exhibit-58 came to be filed by accused No.1. Ashokbhai Chandulal Bhatt and accused No.8 Mayur Natwarlal Dave to discharge them and both accused are petitioners in the present Criminal Revision Application No. 474 of 2001. While accused No.4 Harendrakumar Ramchandra Pathak preferred

Application at Exh. 56 to discharge him in the said Sessions Case and he is the petitioner in Criminal Revision Application No. 486 of 2001. While remaining accused preferred Application at Exhibit 57. The learned Trial Judge vide impugned common order decided these three applications i.e. Exhibits 56, 57 and 58 and rejected all these three applications.

5 Out of 11 accused, only three accused i.e. accused No.1 Ashokbhai Chandulal Bhatt and accused No.8 Mayur Natwarlal Dave preferred the present Criminal Revision Application No. 474 of 2001 against rejection of Application Exhibit-58 and accused No.4 Mr. Harendrakumar Ramchandra Pathak has filed Criminal Revision Application No. 486 of 2001, against rejection of Application for discharge at Exhibit-56. Remaining accused have not preferred any application against rejection of Application - Exhibit 57.

6 Thus, the scope of both the Criminal Revision Applications is limited to three accused out of 11 i.e. accused No.1, 4 and 8 who are petitioners of Criminal Revision Application No. 474 of 2001 and Criminal Revision Application No. 486 of 2001.

7 In both the Criminal Revision Applications, on behalf of the three petitioners, learned Senior Counsels Mr. S.B. Vakil and learned Senior Counsel Mr. J.M. Panchal were heard. On behalf of the State, the then learned Public Prosecutor Mr. A.D. Oza was heard

fully and thereafter learned APP Mr. Kodekar remained present. While on behalf of the widow of the victim Police Constable, learned Advocate Mr. B.M. Gupta was heard at length. It is pertinent to note here that in trial proceedings, audience to the widow of the victim Police Constable Laxmanbhai Jamabhai was refused by the Trial Court as well as by this Court. However, this being Revision Application, learned Advocate Mr. Gupta was allowed to address the Court in both the Criminal Revision Applications on behalf of the widow of the victim in the incident.

8 Mainly on behalf of all the petitioners in both the Criminal Revision Applications, I was taken to the material produced by the Police under Section 173 of the Code of Criminal Procedure. It was submitted by both the learned Senior Counsels of the petitioners that the inspection report prepared by the Officers of this Court in pursuance of the direction issued by the Division Bench of this Court must be looked into at the stage of framing of the charge, for which this Court in Criminal Misc. Application No. 6684 of 2000, vide judgment and order dated 15th of November, 2000, quashed the charge framed and permitted the accused to make all submissions for the framing of the charge or discharge and other pleas permissible in law. It is submitted that the Trial Court completely ignored the report of the Commissioner which is vital aspect of the prosecution case. Limiting the arguments for the present three petitioners – accused, it was submitted by both the Counsels that

looking to the police papers and charge sheet, except police witnesses, there is nothing on the record involving the present three petitioners in the said crime. It was submitted by all vehemence that even in the prosecution case, from the charge sheet submitted under Section 173 of the Code of Criminal Procedure, there are two set of evidence, each destroying the other, and in contradiction to the extent that the set of evidence is diametrically opposite of the other. It is submitted that the statements of the Joint Registrar Mr. Anjanikumar Harilal Thaker and Additional Registrar Bhupatrai Revashankar Acharya and the statement of learned Senior Counsel Mr. H.L. Patel (since expired) are seen, it leaves no doubt that the present three petitioners were not at the scene of offence, but were accompanying the Commissioner and Complainant Mr. J. Mahapatra in some other area of Khadia. It is submitted that only because writ petitions came to be filed before this Court and one criminal case against the police personnel for excess of the power and atrocity was filed in the Court of learned Metropolitan Magistrate against Mr. R.K. Vashishtha and Mr. R.J.Bhatt, both Police Officers of high rank, these petitioners are involved and implicated falsely in this case. It is submitted that even if the statements of police constables are taken as it is, no overt act is attributed to the present petitioners because the deceased was attacked by accused Kiran Jayantilal and injured was attacked by other accused, but none from the present petitioners. The Trial Court ought to have taken this into consideration because it becomes the duty of the Trial Court to

apply judicial mind to the papers submitted before it while framing charge and to comply with Section 227 of the Code of Criminal Procedure strictly. It was by all vehemence submitted that accused No.8 and petitioner No.2 of Criminal Revision Application No. 474 of 2001 on the day of the incident was with the Court Commissioner right from 8.30 a.m. to 1.30 p.m. The said Commissioner was appointed by learned Metropolitan Magistrate on account of criminal case filed against the police personnel and on request made by the citizens and complainant, learned Metropolitan Magistrate also appointed a Commissioner to draw panchnama, and on 22nd of April, 1985, accused No.8 Mayur Natwarlal Dave was with the Commissioner, which is apparent from the panchnama drawn and placed on record by the accused. It is submitted that even if the plea of the present petitioners of alibi is not considered, then also, in respect of presence of the present petitioners at the scene of offence becomes doubtful, which is apparent from the papers submitted by the Police under Section 173 of the Code of Criminal Procedure. Learned Counsels took this Court through each statements of the witnesses. At least, including the panchas in charge sheet, 57 witnesses are cited by the Investigating Agency. It was submitted that when the witnesses of the status of Registrars of this Court, in clear terms stated before the Police under Section 161 of the Criminal Procedure Code that accused No. 1 Ashok Chandulal Bhatt and accused No.4 Harendra Pathak were accompanying them right from 10.00 a.m. To 11. 00 a.m. from Brahmpuri-ni-pole to

Astodia Police Station, the question of they being in the crowd near Chhabila Hanuman, a place of incident, is improbable and impossible. It is submitted that Brahmpuri-ni-pole and Chhabila Hanuman are at a distance and topographical situation of Khadia area of Ahmedabad City is such that between Chhabila Hanuman and Brahmpuri-ni-pole, there are many buildings and narrow lanes which is known as pole in the colloquial language. It is submitted that admittedly it is a prosecution case that the incident took place at 10.40 a.m. near Chhabila Hanuman while accused No.1 Ashokbhai Chandulal Bhatt and accused No.4 Harendrakumar Pathak during this time, undoubtedly, were with the Commissioner and the Complainant Mahapatra all the while and never parted with them till 11.00 a.m. till they reached near Astodia Police Station, while for accused No. 8 Mr. Mayur Natwarlal Dave to rule out the presence of this accused at the scene of offence, panchanams drawn by the Commissioner in pursuance of the orders passed by the learned Metropolitan Magistrate is called-in-aid. It is submitted that the Trial Court fell into error in rejecting the applications filed by these petitioners because the Trial Court failed to refer to the directions issued by this Court earlier to take into consideration the Commissioner Report. It was submitted that the Trial Court further erred in rejecting the applications of the present petitioners because the Trial Court took into consideration part of the material produced because the Trial Court relied upon the statements of three Head Constables, eye witnesses and did not take into consideration the

statements of Mr. B.R. Acharya and Mr. A.H. Thakore, both Additional and Joint Registrars of this Court, by which the presence of the present petitioners – accused No.1 Ashokbhai Bhatt and accused No.4 Harin Pathak was established somewhere else than the scene of offence. The Trial Court erred in observing that at the stage of framing of the charge, the plea of alibi emanating from the accused, cannot be considered. It was submitted that, in fact, it was not a question of consideration of plea of alibi raised by the accused, but it was a question of considering wholesome material produced by the Police in framing of the charge and prima facie ascertaining whether the present petitioners were present at the scene of offence. It is submitted that it is not the plea of the present petitioners that alibi which is required to be considered, but taking the police papers as it is, it is established, prima facie, that the present petitioners were not present at the scene of offence. The Trial Court erred in placing reliance on the statements of eye witnesses i.e. police constables and ignoring the statements of Joint Registrar and Additional Registrar of this Court that the presence of the petitioners are shown somewhere else. It is submitted that it is the cardinal principle of law that when two views are possible from the police papers itself, even without referring to the plea of alibi raised by the accused, such accused are required to be discharged and view favourable to the accused should be adopted. It is submitted that therefore from the papers under Section 173 of the Criminal Procedure Code itself two sets of material clearly appears,

one establishes the presence of accused No.1 Ashokbhai Bhatt and accused No.4 Harendrakumar Pathak somewhere else when the offence alleged to have been committed while second set of material in the shape of statements of three Police Constables, it is the prosecution case that accused No.1 Ashokbhai Bhatt and accused No.4 Harendrakumar Bhatt were in the crowd at Chhabila Hanuman at 10.40 a.m. when the offence was committed and when Kiran Jayantilal attacked Constable Laxmanabhai Jamabhai with gupti and other accused attacked two other constables. It is submitted that these two sets appearing from the police record is destroying each other if allowed to stand. In these circumstances, according to law, even without accepting or weighing the evidence and take the material on its face value on account of two sets of material, the accused i.e. present petitioners are required to be discharged. It was submitted that though the learned Trial Court elaborately narrated the principles of law while applying mind at the stage of Sections 227 and 228 of the Criminal Procedure Code, but failed to apply those principles to the facts of the case and, therefore, erred in coming to the conclusion and ultimately failed to exercise the jurisdiction vested in the Trial Court according to law. It is, therefore, submitted by both the Senior Counsels that no overt act is attributed to them, the three petitioners are required to be discharged for the charges levelled against them. It is further submitted by all vehemence that though the present petitioners are charged with the offence punishable under Section 120-B of the

Indian Penal Code for the conspiracy, but in fact, there is no iota of material against them to invite charge against Section 120-B. There is not a single line, according to learned counsels, in the material to even remotely suggest or infer that there was a meeting of mind between the accused an agreement to murder the police constable. Even from the FIR itself this allegation is ruled out. It is, therefore, submitted that the present petitioners are required to be discharged from the allegations against them under Section 120-B of the Indian Penal Code as there is no material at all even remotely to suggest that there was prior meeting of mind between the accused to commit a crime or commit an act by unlawful means. The learned counsels relied upon certain decisions to substantiate their submissions. Those decisions are in the matter of (i) STATE OF KARNATAKA vs. L. MUNISWAMY, as reported in AIR 1977 SC 1389; (ii) UNION OF INDIA vs. PRAFULLA KUMAR SAMAL, as reported in AIR 1979 SC 366; (iii) DILWAR BALU KURANE vs STATE OF MAHARASHTRA, as reported in (2002) 2 SCC 135; (iv)CENTURY SPINNING AND MANUFACTURING CO. LTD vs. THE STATE OF MAHARASHTRA, as reported in AIR 1972 SC 545; (v) NIRANJAN SINGH KARAM SINGH PUNJABI vs. JITENDRA BHIMRAJ BIJJA, as reported in AIR 1990 SC 1962; (vi) STATE OF MAHARASHTRA vs SOM NATH THAPA, as reported in AIR 1996 SC 1744 and (vii) STATE OF ORISSA vs DEBENDRA NATH PADHI, as reported in AIR 2005 SC 359. The decisions cited are taken into consideration and will be discussed.

9 While on behalf of the State, learned P.P. Mr. A.D. Oza boldly accepted that there are two sets of evidence in material submitted by the Police under Section 173 of the Code of Criminal Procedure. It was submitted that witness Police Constable Pravinsinh Himmatsinh, witness Head Constable Udesinh Mehraji and injured witness Ratiram Manruram Yadav, have stated that the petitioner Ashokbhai Chandulal Bhatt and petitioner Harendrakumar Pathak were at the scene of offence and were instigating the crowd to take revenge from the police. At the same time, there are statements of Anjanikumar Harilal Thaker, Joint Registrar of this Court and Bhupatrai Revashanker Acharya, Additional Registrar of this Court, revealing the presence of accused No.1 Ashokbhai Chandulal Bhatt and accused No.8 Harendra Pathak at Brahmpuri Pole and away from the scene of offence. It was submitted that at this juncture meticulous sifting of the evidence is not permitted and from the statements of the police constables, as referred above, it is clear that the present petitioners were instigating the crowd and they were speaking slogans. It is vehemently argued by learned P.P. Mr. Oza that it must be taken note of that irrespective of the presence of the present petitioners at the scene of offence, they are charged with the offence punishable under Section 120-B of the IPC. It is submitted by learned PP Mr. Oza that there cannot be a direct evidence of conspiracy and agreement between the accused and conspiracy can be proved by necessary implications and the

existence of criminal conspiracy can be ascertained from the circumstances having regard to the object of conspiracy and when at this stage meticulous appreciation is ruled out, prima facie, it must be inferred that the present petitioners are involved in conspiracy though they might not be present at the scene of offence. It is submitted that the conduct of the petitioners as disclosed from the police papers is clear that accused No.1 detained the commission to take tea at Brahmpuri Pole to allow the incident in question to occur at near Chhabila Hanuman. It is submitted that by a statement of Major of Army Mr. A.K. Sinha, which was deployed by the State Government, to control the riot, it is amply revealed that on 22nd of April, 1985, the curfew was relaxed at the request of accused No.1 Ashokbhai Bhatt by the State Government and the incident occurred. Not only that, it was submitted that the crowd which was gathered at Chhabila Hanuman as well as near Astodia Police Station, slogans were spoken to take revenge against the police and this denotes prior agreement of mind and it is a prima facie evidence under Section 120-B of the Indian Penal Code. It is submitted that it is not a case of mistaken identity that each of the witnesses knew very well before the incident, the accused No.1 Ashokbhai Bhatt and accused No.4 Harendra Pathak. The learned PP Mr. Oza relied upon certain decisions for his submission in respect of the charge under Section 120-B of the IPC and those decisions are in the matter of (i) MOHAMAD USMAN MOHAMMAD HUSSAIN MANIYAR vs STATE OF MAHARASHTRA, as reported in 1981 Cri. L.J.

588; (ii) YASH PAL MITTAL vs. STATE OF PUNJAB, as reported in 1978 SCC (Cri) 5. Learned PP Mr. Oza also relied upon a decision of this Court in the matter of K.G. SAKSENA vs VIRBHADRASINJHI, as reported in 1985 GLH, 289, wherein this Court observed with respect of Sections 245 and 247 of the Code of Criminal Procedure that if both the Sections are read together in juxtaposition, it is clear that Magistrate is not required to meticulously appreciate the evidence nor the Magistrate is required to consider probable defence. It is further observed that at that stage the Magistrate has to consider whether prima facie case is made out or not. The learned P.P. also relied upon a decision of the Apex Court in the matter of STATE OF MAHARASHTRA vs SOM NATH THAPA, as reported in AIR 1996 SC 1744, wherein in para-57, the Apex Court observed with reference to the statements of the witnesses recorded by the Police twice and contradictory to earlier statements that at the stage of framing of the charge, probative value of statements of witness cannot be gone into. It would be decided at the close of the trial. Relying on these observations, the learned PP Mr. Oza submitted that the probative value of the statements or two sets of materials cannot be ascertained at the stage and when even otherwise the petitioners are charged with the offence punishable under Section 120-B of the IPC and when there is prima facie materials against them, both the Criminal Revision Applications required to be dismissed.

10 While learned Advocate Mr. B.M.Gupta on behalf of the

widow of the victim, who has also filed an affidavit in this Revision Application, submitted that the present petitioners are liable to contempt of court for suppressing material facts. It is submitted that the petitioners had preferred a quashing petition before this Court under Section 482 of the Cr.P.C. being Criminal Misc. Application No. 7397 of 2000 before discharge application was submitted and the said quashing petition was withdrawn unconditionally by the petitioners. It was submitted that therefore filing discharge application thereafter would not be permissible and this fact which is material is suppressed by the petitioners before the Trial Court as well as before this Court. In the discharge application, same points are urged by the petitioners and, therefore, this is a second round, for which the learned Advocate Mr. Gupta relied upon an unreported decision of this Court and a decision of the Supreme Court in the matter of MURRAY AND CO vs. ASHOK KR. NEWATIA, as reported in AIR 2000 SC 833, wherein the Apex Court held that the contemnor was liable to be punished for raising false allegation in his affidavit denying the assertion that property was sold in disobedience of the court order. Of course, this decision is in the facts of the said case.

11 It was contended by Mr. Gupta that the order passed by this Court in Criminal Revision Application No. 570 of 1986 on 25th of September, 2000 was in respect of accused Nos. 6 and 7 and not in respect of present petitioners and, therefore, present petitioners

cannot take advantage of that order and present petitioners cannot argue on the basis of that order that the Trial Court failed to consider or comply with the said order. It was submitted that the statement of witness Mr. A.K. Sinha, Major of Army, makes it clear that on 22nd of April, 1985, curfew in the area of Khadia was relaxed at the request of accused No.1 which is sufficient material at this stage to infer conspiracy on the part of the accused. Relying upon a decision in the matter of REMEMBRANCER OF LEGAL AFFAIRS, WEST BENGAL vs. ANIL KUMAR BHUNJA, as reported in AIR 1980 SC 52, it was submitted that at the stage of framing of the charge, the circumstances and material on record capable of inferring strong suspicion about commission of offence is sufficient for framing of the charge. It is submitted that statements of three police constables and the First Information Report as well as statement Major Mr. A.K. Sinha raise strong suspicion of commission of crime on the part of present petitioners. Relying upon a decision in the matter of STATE OF M.P. Vs SUDBIR PINGLE, as reported in 2000 CRI L.J. 944 (SC), it was submitted that at the stage of framing of charge, trial court is not required to marshal materials on record but only has to prima facie consider whether there is sufficient materials against accused to proceed further. Relying upon a decision in the matter of STREE ATYACHAR VIRODHI PARISHAD vs. DILIP NATHUMAL CHORDIA, as reported in (1989) 1 SCC 715, it was submitted that when trial court finding a prima facie case prefers to frame charges against the accused, High Court should not interfere by probing into sufficiency

of grounds for conviction of the accused and ordering his discharge. In this case, it was submitted that though there was a dying declaration of the victim in favour of the accused, the charge was framed against the accused which was upheld upto the Supreme Court. Relying upon a decision in the matter of STATE OF BIHAR vs. RAMESH SINGH, as reported in AIR 1977 SC 2006, it was submitted that at the initial stage of framing of the charge, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged, but strong suspicion against the accused if the matter remains in the region of suspicion is sufficient to frame the charge. Relying upon again a decision of the Apex Court in the matter of STATE OF MAHARASHTRA vs PRIYA SHARAN MAHARAJ, as reported in AIR 1997 SC 2041, it was argued that the High Court is not permitted to take independent corroboration at the stage of framing of the charge and quash charge and discharge the accused. The decision in the matter of State of Maharashtra vs. Som Nath Thapa (supra), as referred to above, was relied upon for the probative value of the statement recorded by the police. The other decisions relied upon by the learned Advocate Mr. Gupta are in the matter of MUNNA DEVI vs. STATE OF RAJASTHAN, as reported in AIR 2002 SC 107; in the matter of STATE OF U.P. vs. MAN MOHAN, as reported in AIR 1986 SC 1652; in the matter of THE STATE OF KARNATKA vs. KHAJA HUSSAIN, as reported in U.J. (SC) 1983, 36; in the matter of SMT. OM WATI vs. STATE, THROUGH DELHI ADMINISTRATION, as reported in 2001 (2) Supreme 423 and in the

matter of MAJOR GENERAL A.S. GAURAYA vs. S.N. THAKUR, as reported in AIR 1986 SC 1440. These are the cases wherein the Apex Court after stating the principles to be followed by the Trial Court at the stage of framing of the charge, directed to frame the charge. Therefore, it was submitted that at the stage of framing of the charge, the court is not permitted to sift and weigh the evidence on record and cannot apply the standards which are required to be applied at the trial, but only the court has to see the prima facie case. It is further submitted that while exercising the revisional powers, the High Court should follow the rule of self-restraint and revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of criminal proceedings or the framing of the charge for the facts as stated in the First Information Report, if they are taken at their face value and accepted in their entirety, would not constitute the offence. It was submitted that the present petitioner accused No.1 Ashokbhai Bhatt had preferred an application for discharge earlier, which came to be rejected and now the second application is barred and this application is required to be dismissed on that ground in limine. It was further vehemently urged that both the Criminal Revision Applications are required to be dismissed.

12 Before evaluating the contentions raised in marathon length by the parties, it is necessary to have a look at the material placed before the Trial Judge in shape of charge sheet under Section

173 of the Code of Criminal Procedure. I have gone through each of the statements recorded by the police and the documents produced therewith without weighing or sifting or without considering the truth, veracity or effect of such statements, it clearly appears that in both these Criminal Revision Applications, material statements of witnesses are, (i) Bhupatrai Revashanker Acharya, Additional Registrar of this Court and Commissioner as appointed by the Division Bench of this Court; (ii) statement of Anjanikumar Harilal Thaker, Joint Registrar of this Court and appointed as Commissioner by the Division Bench of this Court; (iii) the statement of Senior Counsel late Shri H.L. Patel, who was advocate of the petitioners in the petition filed in 1985 in this High Court. On the other hand, three statements of Police Constables and eye witnesses, which are material to be looked into are the statements of (i) Unarmed Police Constable Pravinsinh Himmatsinh; (ii) Udesinh Mehraji, Unarmed Second Grade Head Constable and (iii) Ratiram Magaruram Yadav, Home Guard and all these three constables were present at the scene of offence.

13 Now it is established law that all the courts are required to do at the time of framing of the charge and the principles as propounded by the Apex Court can shortly be narrated as under :

13.1 In the matter of UNION OF INDIA vs. PRAFULLA KUMAR SAMAL, as reported in AIR 1979 SC 366, the Apex Court distinctly

propounded these four principles in Para-10 to be followed by the Courts while assessing the materials at the stage of framing of the charge. Para-10 as under :

> 10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :
>
> (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;
>
> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the

evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(Emphasis supplied)

13.2 In addition to this, it must be stated that the introduction of the provision in shape of Section 227 in the Code of Criminal Procedure itself reveals the intention of the Legislature that in order to avoid frivolous prosecution and prevent the accused from being tried of an offence on materials which do not furnish a reasonable probability of conviction, certain duties as

envisaged in the provision are cast upon the court while assessing material for framing of the charge or discharge the accused. At that stage, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold, nature of the evidence recorded by the police or the documents produced before the court which ex facie discloses there are suspicious circumstances against the accused so as to frame a charge against him. In a decision referred above in the matter of Union of India vs. Prafulla Kumar (supra), in para-7 it is observed that the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post-office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts.

13.3 In the matter of CENTURY SPINNING & MANUFACTURING CO. LTD vs STATE OF MAHARASHTRA, as reported in AIR 1972 SC 545, it is observed by the Apex Court that the order framing of the charges does substantially affect the person's liberty and it cannot be said that the court must automatically frame the

charge merely because the prosecuting authorities by relying on the documents referred to in Section 173 consider it proper to institute the case. The responsibility of framing of the charge is that of the court and it has to judicially consider the question of doing so. Without fully adverting to the material on the record it must not blindly adopt the decision of the prosecution. In the matter of NIRANJAN SINGH KARAM SINGH PUNJABI vs. JITENDRA BHIMRAJ BIJJA, as reported in AIR 1990 SC 1962, the Apex Court in para-7 observed that for the limited purpose of framing charge, sifting of the evidence may be necessary as it cannot be expected even at that initial stage to accept that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. It is necessary to refer to Para-6 of the said decision which is as under :

> “6. The next question is what is the scope and ambit of the “consideration” by the trial Court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record

and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the State of Bihar v. Ramesh Singh, (1978) 1 SCR 257: (AIR 1977 SC 2018), this Court observed that at the initial stage of the framing of the charge if there is a strong suspicion - evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal, (1979) 2 SCR 229 : (AIR 1979 SC 366) this Court after considering the scope of Section 227 observed that the words `no sufficient ground for proceeding against the accused" clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution

but he has to exercise his judicial mind to the facts of the case in order to determine that a case of trial has been made out by the prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence.

Therefore, the Apex Court decided four principles to be followed in para-10 of the decision.

13.4 Again in the said decision in Para-7 the Apex Court after discussing the above law observed that for the limited purpose the court should sift the evidence.

13.5 Therefore, the principles as propounded by the Apex Court in various decisions can be summarised as above that the Court is permitted to sift and weigh the materials on record at the stage of framing of the charge for limited purpose for ascertaining whether there are sufficient grounds to proceed against and it is not permitted to ascertain whether material as adduced would result into conviction or not, but at the same time, it must be noted by the court that if the material produced by the police under Section 173 is taken as it is on its face value

without being cross-examination, it would not result into conviction, then the court should discharge the accused.

14 The next question which arises whether at the time of framing of the charge, the defence of the accused, document produced by him and documents produced under Section 91 of the Code of Criminal Procedure can be taken into consideration. Now, by decision of the Larger Bench of the Apex Court in the matter of STATE OF ORISSA vs DEBENDRA NATH PADHI, as reported in AIR 2005 SC 359, the Apex Court has settled that the plea of defence of the accused nor the production of document under Section 91 can be considered at the stage of framing of the charge. It is further observed and decided by the Apex Court that at the stage of framing of the charge, the material produced by the police under Section 173 and that material alone must be taken into consideration by the courts. No other material, document or any plea of the accused could be considered by the courts. This decision is rendered by the Apex Court on 29th of January, 2004. However, before pronouncement of this decision by the Apex Court, this Court by two orders directed the prosecution to produce documents on record to enable the accused to make effective representation against framing of the charge. Once the charge already framed was quashed and the accused were permitted to make fresh submission on production of the report of the Commissioner. These proceedings have arisen from the orders passed by this Court as the accused,

present petitioner, filed fresh application to discharge which came to be rejected. While the learned Trial Judge decided this application on 13th of September, 2001, the direction by this court in two earlier decisions were in existence to produce on record the Commissioner report. This requires to be observed because these proceedings have arisen from the directions by this Court and thereafter the Apex Court ruled in the above matter of State of Orissa v. Debendra Nath Padhi (supra) that no such material can be considered at the time of framing of the charge. Thus, though these proceedings would be maintainable as it is in pursuance of the directions issued by this Court, but when two Revision Applications are decided, this Court is bound by the principles laid down in the matter of State of Orissa v. Debendra Nath Padhi (supra). Meaning thereby that, the material placed on record under Section 173 alone and alone shall have to be considered. This also disposes the submission made by Mr. Gupta that the second application of discharge is not maintainable and that the law declared by the Supreme Court has to be taken retrospectively. There cannot be any doubt that the law declared by the Supreme Court has to be taken retrospectively and, therefore, the ambit of these proceedings are limited to the material placed on record in the shape of Section 173, but since the fresh applications for discharge came to be filed in pursuance of the directions issued by this Court, it could not be said to be not maintainable. This view is fortified by the decision of the Apex Court in the matter of STATE OF MADHYA PRADESH v. MOHANLAL SONI,

as reported in (2000) 6 SSC 338, wherein the Trial Court was directed to take into consideration the documents made available by the accused during investigation while framing of the charge had attained finality since that order was not challenged and the Apex Court came to the conclusion that the Trial Court was bound and governed by the said direction of the High Court. Thus, though, these Criminal Revision Applications can be considered within the scope of the law as laid down by the Apex court in the matter of State of Orissa v. Debendra Nath Padhi (supra), but it could not be said that the second application for discharge was not maintainable.

15 Now referring to the materials produced by the police under Section 173 of the Cr.P.C. only and not referring even to the Commissioner report as was produced by the prosecution as directed by this Court, the position emerges that at the time of incident, the presence of accused No.1 Ashokbhai Chandulal Bhatt and accused No.4 Harendrakumar Pathak is established near Brahmpuri pole and away from the place of incident while three police constables, as stated above, alleged that the accused No.1 Ashokbhai Bhatt and accused No.8 Mayur Natwarlal Dave and accused No.4 Harendrakumar Pathak were amongst the crowd instigating the persons. On account of which, accused Kiran Jayantilal Shah inflicted blow of gupti on deceased. It is pertinent to note that Mr. Mahaptra, complainant and Deputy Police Commissioner of Southern Zone also admitted in First Information

Report that at the time of incident accused No.1 Ashok Bhatt and accused No.4 Haren Pathak were with the Commissioner. Now, this material is required to be assessed as to whether charges required to be framed against accused No.1 Ashokbhai Chandulal Bhatt and accused No.4 Harendrakumar Ramchandra Pathak. It is pertinent to note here that so far as the accused No.8 Mayur Natwarlal Dave is concerned, his presence along with Commissioner at Brahmpuri Pole has not been stated by witness Anjanikumar Harilal Thaker or by witness Bhupatrai Revashankar Acharya and, therefore, so far as his claim of discharge is concerned, cannot be accepted relying upon the decision of the Apex Court in the matter of State of Orissa v. Debendra Nath Padhi (supra) considering the material produced on record under Section 173 of the Cr.P.C. Thus, so far as the material produced in respect of accused No.1 Ashokbhai Chandulal Bhatt and accused No.4 Harendrakumar Ramchandra Pathak is concerned, there are two different set of evidence, which the Trial Court failed to take note of.

16 I am very conscious that this judgment is likely to be burdened heavily by adverting to the relevant statement of the witnesses, but I humbly believe that the relevant statements of the witnesses are required to be narrated in this judgment to exercise jurisdiction more clearly and discern whether the trial court erred in not exercising the jurisdiction. Therefore, at least, free translation of five statements relevant for the purpose are narrated as under :

i) 30.4.1985 : Bhupatrai Revashankar Acharya

My name Bhupatrai Revashankar Acharya, age 55, profession - service, address – Vastrapur Government Colony (Vashat), Block No. 8/1, Ahmedabad.

On being asked in person, I hereby state that I am working as an Additional Registrar in the High Court since 1984. As per the order of the Gujarat High Court dated 20.4.1985, I and Shri Thakar who is a Joint Registrar, were appointed as a Committee by the Gujarat High Court to take photographs of the so called damaged property and to prepare a short note thereof. It was ordered to proceed on the presentation of the list of the property by the applicants (petitioners) or their advocates in the presence of a representative appointed by the Government. I and Shri Thakar commenced the proceedings in the evening on 20.4.1985 and told the applicants and their advocates to present the list of so called damage to property. So, a list was given by them. On the receipt of the information to this matter, the Secretary to Home Department, Malvaniya came in person and he informed that Police Officer Shri Mahapatre would be present as a representative from the Government during the proceedings with us.

A meeting was held in the morning on 21.4.1985 in the High Court and it was decided to start the proceedings. This matter was reported to the Advocates of the party as well as the Government. So we were gathered in the building of the High Court at 8.00 O'clock. Shri Mahapatra was present. Advocates Shree Harishchandra Patel, Shri Yatinbhai Oza, Shri Girishbhai Dave, Miss Shah and Shri Ashok Bhatt, Shri Babubhai Thakor also came to the High Court. Shree Malek working in the Nazer branch of the High Court had also accompanied us to take photographs with his camera. With a view to taking notes of damage, Private Secretary Shri Dholakiya had also accompanied us. Chopdar Shri Rajuji and Clerk Shri Mukesh Shah had also accompanied us. We all, leaving Gujarat High Court, went to the area in Ahmedabad which is known as `Bhutni Ambali' about 8.15 O'clock and started the proceedings from there. Girish Dave, Ashok Bhatt, Babubhai Thakar, Nanusha Thakor were present with us. The damaged property, buildings, vehicles were shown to us and notes regarding the damage were taken by Joint Registrar Shri Dholakiya and the photographs of material damage caused to all the property wherever found, were taken by Shri Malek.

We, on that day i.e. dt. 21.4.1985 in the presence of Shri Mahapatra, visited various streets (poles) at 2.00 O'clock in the afternoon and in this way, we did the

proceedings. On this day, we first went to the Astodia Police Station and P.I. Shri Yadav and three-four policeman in plain dress joined us. Besides this, we were accompanied by three S.R.P. Armed men. I don't know the names in plain dresses. When we did the procedure, the curfew was effective in that area and when the procedure was going on, few people of the area used to come out to show the damage or to talk. Any big crowd did not gather at such time but ten to fifteen people, turn by turn, showed us the damage they have suffered. At such time, some excitement was seen in the crowd due to the presence of Shri Yadav and ten of police force. Advocate Shri Yatin Oza had raised objections for them and by requesting Shri Mahapatra, Shri Yadav and Constables in civilian dress were sent back and the procedure was continued. We finished the procedure for that day at 2.00 p.m. And came back.

Shri Thakar, Mahapatra including me, met in the High Court on 22nd April, 1985 and instructions were given to applicants on previous day to visit Astodia Police Station. Shri Dholakiya, Shri Malek, Shri Mukesh Shah and Chopdar Shri Rajuji Chawda reached Astodiya Police Station at 8.15 O'clock. Advocate Shri Harischchandra Patel, Advocate Shri Girish Dave, Advocate Shri Babubhai Patel, applicant Shri Babubhai Thakore, Nansha Thakore met us at Astodia Police Station. At that moment, the time was approximately 8.00 or 8.15. Our

three armed SRP personnel were on duty. After inquiry and procedure being initiated by us, Shri Ashok Bhatt also participated in the procedure and one Corporator whose surname is Pathak also participated in this matter. I don't know other people. Like the previous day, damaged property were shown to us by visiting various poles and its photographs were taken by Shri Malek and Shri Dholakiya recorded the information regarding the damages. When the procedure was being initiated, people started gathering after the relaxation in curfew at 10.00 O' clock. At that time, the crowd was uncontrollable and, therefore, local people allowed the other people to go to other poles through their houses and we continued our procedure after crowd got dispersed. We initiated our procedure in the presence of above mentioned people till 11.00 O'clock. As we are to present the report in our High Court within the stipulated time, we have considered to initiated further inquiry after the time limit of relaxation in curfew was lapsed and we started going towards Astodiya Police Station. For that purpose, we started going towards the main road connecting Astodia Police Station via one pole and I don't know the name of that pole and we started reaching towards Astodiya Police Station via main road and when we reached Raipur Darwaja, we saw a big crowd making a lot of noise and running helter-skelter inside Raipur Darwaja and we immediately reached Astodiya Police Station. At that time,

Mahapatra was with us. Ashok Bhatt parted from us near Raipur Darwaja. Babubhai Thakore and Nansha Thakore were told to sit in the other room to ensure that I, Shri Thakor, Shri Dholakiya, Shri Malekh, Mukesh Shah, Babubhai Thakore, Nansha Thakore, Advocate Shri Harishchandra Patel and Shri Babubhai Thakore along with Shri Mahapatra would go inside the chamber of Police Inspector of Astodiya Police Station. When we reached Astodia Police Station, we came to know that our personnel of Home Guard was attacked with a piercing weapon called Dhariya and that person sustained injuries on his right hand. That injured person arrived in the Police Station and we saw him injured. When we were in the Police Station, Police Constable informed Shri Mahapatra that one personnel of police force was stabbed and his condition was serious. Shri Mahapatra was in plain dress. He went outside in his uniform. After some time, another police constable informed that injured police constable succumbed to injuries while being taken to the hospital. After receiving this news, the staff of police station started making hue and cry and those personnel were dissatisfied. Shri Mahapatra after coming back talked to his higher authority on the telephone and gave information about restlessness which was prevailing among personnel. Afterwards, he found the situation to be very tense and decided to return back after the closing of procedure and returned back in High Court with police escort.

When we were coming back, Shri Mahapatra endeavoured his level best to cool down personnel of police force and to persuade them. But we found that they were protesting against Shri Mahapatra.

Shri Mahapatra told us to stop the procedure due to the relaxation in curfew and gathering of mob on 22.4.85. I do not remember whether Shri Ashok Bhatt and Shri Pathak persuaded the mob. No excitement was witnessed in the crowd. Shri Mahapatra had not told to call additional force of police and army in my presence. We have taken tea in Pakhali ni pole. I don't know whose house what that. But that person was familiar to Shri Thakar. Shri Mahapatra also came with us to drink tea.

My facts written by me are true and complete.

In person – Police Superintendent
Dated: 30.4.85. Crime Branch, Ahmedabad City.

(**Emphasis supplied)**

ii) Date: 30.4.1985: Anjanikumar Harilal Thakar

On being asked, I hereby state that I am serving in Gujarat High Court as Joint Registrar. On 20.4.1985, two Committees were appointed for Spl. Criminal Application No.

284, 285, 286, 287/1985 by the Gujarat High Court. Among this Committees, I was appointed in one Committee and Additional Registrar of Gujarat High Court Shri D.R. Acharya was appointed to assist me. Our Committee was assigned the work of inspection of damaged properties as per the petitioner's list and to take photographs thereof and to take a summary of the damages. For this purpose, Mr. Malek working in the Nazar Branch of High Court was called to take photographs and Clerk Mr. Shah was called as Assistant. Private Secretary of High Court Mr. Dholakia was called for noting the same. We were given list by Pleaders on dt. 20.4.85. As were were required by High Court to work in time limit, so we decided to meet at High Court on Sunday the 21st at about 8.14 in the morning. As per the directions of High Court a Government Representative had to attend my procedure. We asked Government Pleader about Government Representative and as per that Deputy Secretary Mr. Malavaniya came to my chamber with Deputy Police Commissioner Mr. Mahapatra and told us that Mr. Mahapatra will be with us as Government Representative. Then after Mr.Malvaniya went back. Meanwhile, as Advocates of petitioners Mr. Harishchandra L. Patel, Mr. B.C.Patel, Mr. Girish Dave,Mr. Yatin Oza, Mr. Rasikbhai Shah came and Kum. Vasuben Shah was also there.

Then after we all left High Court at about 8.15 a.m. And reached Astodiya Police Station. Petitioner Mr. Babubhai Thakor, Mr. Nansha Thakor were also with us from High Court. Mr.Mahapatra took three armed SRP persons as escorts from Astodiya Police Station. During this Kum. Vasuben Shah joined us from Astodia Police Station. We started our procedure from Bhutni Ambli area. Police Inspector Shri Yadav and few policemen in plain dress were with us during this. An autorickhaw was abandoned near Vad ni Pole. We took its photograph and took note of that. Thereafter we entered Vad ni Pole. At that time, curfew was effected. Mr. Ashok Bhatt and Mr.Harin Pathak were with us from Astodia Police Station. They were showing and representing the damages. Petitioners and their pleaders were also showing the damages. Simultaneously we photographed and took note in the area of Vad ni Pole, Koth ni Pole, Kaachwado, Thengawado, Raval Sheri, Makeriwad, Chabila Hanuman, Shahid ni Khambhi and D.P. Centre. When we were doing out work in Kachwada area, some people were excited due to the presence of Mr. Yadav and the police people and Advocate Mr. Yatin Oza opposed about the presence of police, so we requested Mr. Mahapatra and Mr. Mahapatra was convinced and as per his instruction, the police people left the place peacefully. As people were excited they were opposing the presence of Police, so military men were escorting during our procedure.

From Chhabila Hanuman, we went to Dwarkadhis haveli by Bauwani Pole and photographed the broken doors of Haweli in Panditji's pole and then after we photographed Vishwakarma Prabhuji's temple's door in Panditji ni Pole and took the estimate of damage, then after we went to Parbadi ni Pole from Raipur Chakla and took photographs of the Gates of that pole and took note thereof. Then after we went to Chakleshwar Mahadev area and photographed some broken water tapes etc of shops and houses and then we went to a five storied building and noted the damage over there. In completing this procedure much time was consumed and it was almost 2 p.m. and we completed that day's work and got back at Astodia Police Station and then went back to our places. During all this procedure Mr. Mahapatra was outright with us at every place and in every house.

On the next day, viz. Monday dated 22.4.85, I and my team and Mr. Mahapatra met at High Court as decided. Advocate Mr. Harishchandra Patel, Mr. B.C. Patel, Mr. Babubhai Thakor and Mr. Nansha Thakor were also there with us at approx. 8 a.m. We left High Court at 8.15 a.m. and reached Astodia Police Station. Mr. Mahapatra took three SRP person and a writer with him, who was not in uniform. On this day, we entered Raipur Drawaza and started noting the

damages occurred to the properties on both sides of the Bazar area and taken photographs thereof. We noted the damages occurred to the telephone meter outside the Murlidhar Temple and photographed the building on the other side. Thereafter we entered Lamba Paada ni pole, at that time, Mr. Ashok Bhatt and Mr. Harin Pathak joined us. We entered Chhar Sheri in Pakhaali's pole from a house of Lamba Padda ni pole and noted and photographed the damage occurred in the choktha (common plot) and various galis of that pole. Meanwhile, the curfew was relaxed at about 10.30 a.m. and we reached near Dehla and photographed a scooter lying there. At this time, a person named Jayantilal who is familiar to me living in that mohalla. We all went to his home to have tea. Mr. Mahapatra, Mr. Ashok Bhatt, Shri Nansha Thakor, Mr. Harin Pathak, Mr. Babubhai Thakor and the above mentioned Advocates were with us. We spend approx. half an hour over there.

Then after we came out and saw that so many people were gathered there due to relaxation of curfew. So we thought not to proceed and as there were big mobs in the pole we entered sidi ni pole from a narrow galli and from there we reached to a big road and from there we reached Raipur Darwaza by walking and from outside Raipur Darwaza, we saw that many people mob were gathered inside. Mr. Mahapatra and we means our team went to Astodia Police

Station and Mr. Ashok Bhatt, Mr. Hari Pathak and other petitioners and pleaders were ported outside the Darwaza from us.

When we entered the Police Station, a constable informed Mr. Mahapatra that one of a Home Guard personnel was attacked with Dhariya on his right hand and we all seen that personnel meanwhile when were escorting and going to sit in the police station. A constable came and informed Mr. Mahapatra that one of the police personnel is injured near Chhabila Hanuman and he was being taken to Hospital.

After that Shri Mahapatra changed his dress and put on uniform. When they were in the police station, they received the report that the constable who was injured had died. Afterwards Shri Mahapatra went to police station saying that he will be back in a while. After few minutes they came back. Some of the police personnel were making provocative statements outside the police station as their colleague was killed. And they were shouting “strike strike”. Sensing the mood of the police personnel we demanded the escort from Shri Mahapatra and Mahapatra immediately made arrangements for the escort. We came back and I will inform about it when it is necessary. When we were initiating the procedure on 22.4.85, some of the people from the agitated

mob gathered outside the police station and at that time, Shri Mahapatra had not given any instruction to complete the procedure. And whether he has called for additional force of police or not, I do not have such information. Local people of various streets and Mahapatra had given full cooperation during the inquiries of both day.

The above mentioned facts written by me are true and complete.

In person – Police Superintendent
Crime Branch, Ahmedabad City.

(Emphasis supplied)

Learned Senior Counsel Mr. H.L. Patel has stated in his statement supporting the say of above two witnesses Mr. B.R. Acharya and Mr. Anjanikumar Harilal Thakar.

These three statements undoubtedly establish that the presence of accused No. 1 Ashokbhai Chandulal Bhatt and accused NO.4 Harendrakumar Ramchandra Pathak was not at the scene of offence at Chhabila Hanuman but they were with the complainant Mr. Mahapatra, Deputy Commissioner of Police and Commissioner appointed by the Division Bench of this Court at Brahmpuri Pole away from the scene of offence.

While three statements of Police Constables state as

under:

1. Date: 23.4.85 : Pravinsinh Himmatsinh, B.No. 3009, Service Astodia Police Station, Ahmedabad City.

On being asked in person, I inform that I have been serving in Astodia Police Station for the last 16 months and for the last six months I have been working in the Surveillance squad. For the last one and half to two months, the movement of Anamat has started in Gujarat and Ahmedabad City. Taking advantage of this Anamat movement, some communalist and anti-social elements have started criminal activities of robbery and violence. Beside this, the opposite party members are doing different activities as an effort to defame the police and doing such things that creates bad impression of police in the public. Also they do such activities like attack and throwing stones and the activities that create severe pain to the policemen and cause dangerous situation for them in the area of Raipur and Khadiya that fall under the Astodiya Police Station. With the intention of obstructing the duty of the police, Home Guard and SRP, they break the board of the shops and burn them on the road, put obstacles like stones and pillars on the road. They abuse the men on duty to provoke them and throw burning lumps on them with the intention of damaging life and property. For the protection of life and property of the people and the men on duty, we have to resort to firing, as we are left with no choice. Finally they

got to the court against such firing and give exaggerating and false charges against police. Thus,they create such circumstances that generate hatred in the public and residents of other area for the police. In reference to such firing on 16.4.85 and 17.4.85 done in self protection, the MLA of the area Shri Ashok Chandulal Bhatt, resident of Kameshwar ni pole, Raipur, Ahmedabad, filed a petition in the Gujarat High Court and got an order for investigation about police atrocity. In this reference, the Commission has been constituted by the High Court. Joint Registrar Shri Thakar and Shri Chaudhary came for enquiry in the morning and along with them PI Shri Yadav and Police Constable Shri Mahavirsinh Diluba and Husenmiya Jenumiya and Deputy Police Commissioner Shri Mahapatra and Police Constable Shri Husenmiya and these three people were forced to return to the police station. The members of the Commission came again for investigation on 22.4.85 and started the procedure from Chhabila Hanuman at 8.30 a.m. At that time, I, Head Constable Udesinh Maheshbhai and Police Commissioner Shri Mahapatra were present as police bandobust. As there was relaxation in the curfew from 10 am to 12 pm, Shri Mahapatra has suggested to complete the procedure as soon as possible and leave as there was possibility of gathering crowd. But the MLA Ashok Chandulal Bhatt and Corporator Harin Pathak and Ghanshyambhai Mehta, Shri Nanashi Thakor, Shri Bachubhai

Thakor and the petitioner Shri Mayur Natvarlal Dave were present at that time. They kept the officers of the Commission occupied in the name of showing different places and took them for tea in Brahmpuri ni Pole, Pakhali ni Pole. As a result, people began to gather at 10 a.m. when the curfew released. About 100 people gathered. When Shri Mahaptra felt that the crowd size would increase much, he suggested the officers of the Commission to finish off and move, but they did not. Meanwhile much crowd gathered and as Shri Mahapatra felt that more bandobust would be needed, he told me and Head Constable Udesinh Maheraji that you go to the police station and bring if there are men of outside forces. Otherwise, bring more men from the police station. Therefore, I and Head Constable Udesinh Maheraji came out to bring other men and on coming out, we did not find men of outside forces. So we went to the police station. Inspector Shri Yadav was present, so we told him that more bandobust is needed for the officers of the Commission and Shri Mahapatra had asked for more men. So he told us to taken men from the reserve of the Home Guard and SRP. So I and Head Constable Udesinh took the Head Constable of Group No.7,namely, Sitaram Ghadke and his three men, and Ratiram Magarooram Yadav and other four people of Home Guard and Head Constable Laxmanbhai Jamabhai, serving at Astodia police station with us. We took the way from Chhabila Hanuman to Pakhali ni Pole, Brahmpuri

Pole. We reached at the entrance of Pakhali ni pole Chhabila Hanuman at 10.40 a.m. We saw a crowd of about 200 to 250 people standing there. The people mentioned above were also present in the crowd and were provoking the mob, shouting "we will revenge the blood with blood" "chop the police into pieces". The moment we took turn to go towards the place where Shri Mahapatra and the Officers of the Commission were, the men attacked us with gupti, sickles and pipes and Vijay Lamba hit a sickle on the elbow of Home Guard Ratiram Magarooram who was walking on the front. As Ratiram shouted, Laxmanbhai rushed to save him and tried to evade. At this time, Kiran Jayantilal stabbed Laxmanbhai Jamabhai from the back in such a way that the pointed part of the weapon came out from the other side. We all got into the quarrel and caught Kiran Jayantilal who had used the gupti, Vijay Lamba who had used sickle and Paresh Pandurang Dhanorkar who had used the chain of a bicycle. Before Kiran Jayantilal stabbed the gupti, he had beaten the chain to Head Constable Laxmanbhai. We caught these three men and handed over to the men of SRP. Injured Home Guard Ratiram Magarooram went to the Astodiya Police Station and the Head Constable was helped to sit in rickshaw No. GTS 1398 and PSI Shri Brahmbhat and Vasava of Astodia Police Station rushed to the sight after they came to know about the incident. And army people also came there and they told that the area was

under their control and told that we were not supposed to nab anybody. And above mentioned men of SRP with me held those three men. After realizing that they would fight among themselves with their weapon, they released the ones who were caught. At that time, along with the personnel of military forces, Ashok Chandulal Bhatt, Harin Pathak, Nansha Thakor, Mayur Dave, Dhruv Kumar Vyas, Madhukar Vyas etc were present. And these men were telling provoking statements like blood will be avenged with blood and police should be cut into pieces. The injured Head Constable was taken to the police station in the above mentioned auto rickshaw. They both were taken to the V.S. Hospital by the government for medical treatment. We informed about this incident to Shri Mahapatra and other higher level officers. As Shri Laxmanbhai succumbed to the injuries in V.S. Hospital at 11.30, Home Guard Ratilal Manruram was admitted to V.S. Hospital as an indoor patient.

Above mentioned facts written by me are true and complete.

In person – Police Superintendent
Crime Branch, Ahmedabad City.

(Emphasis supplied)

2. Date: 23.4.85 : Udesinh Mehraji, Unarmed Second Grade Head Constable, Service at Astodiya Police Station, Ahmedabad City.

On being asked in person, I am giving the statement that

I have been serving at Astodia Police Station as Head Constable, survey squad for the last two and half years and Shri Jadav Saheb is P.I. and Shri R.J. Bhatt Saheb is the S.P. of our division. Our police station falls under the southern division and Shree J. Mahapatra saheb is the Deputy Commissioner of Police of Southern Division.

The anti-reservation movement has been started in Ahmedabad city and Gujarat State for the last one and a half to two months. The Government and anti-social elements have taken the disadvantage of reservation movement and started the offensive activities like violence and robbery. Moreover, the men of the Opposition try to defame the Government and the police and also try to degrade the impression of the police in the public. Furthermore, the people of the area of Raipur, Khadiya under the area of Astodia Police Station throw the stones to and attack the police on duty in such a manner that it may cause the substantial damage, grievous hurt to or give threat to the police. Furthermore they break and burn the boards of the shops in this area and make the hurdles by putting the barriers of stones and poles etc on the road so that the men of the police, SRP and the Home Guards cannot perform their duty well. They use dirty abuse to instigate the men on duty and throw burning lamps to cause the damage to the life and the property and creates

such a situation where firing becomes necessary to protect the lives, property of the public and the men on duty. They appeal in the court and make the exaggerated, false and unrealistic allegations and such circumstances arise which creates the feeling of hatred among people against the police man of the other area. In the awe of such firming made by the Police in self-defence on 16.4.85 and 17.4.85, the MLA of this area Shri Ashok Chandulal Bhatt, residence Kameshwar Pole, Raipur, Ahmedabad, has filed the writ petition in Hon'ble High Court and has got the order to inquire into police oppression/subjugation and following that order on 21.4.85, Shri Thakor Saheb, Joint Registrar, appointed in this Commission from the Hon'ble High Court, Shri Chaudhary Saheb, our P.I. Shri Yadav Saheb, Police Constable Mahavirsingh Diluba and Police Constable Hussein Miya Jenumiya, Deputy Commissioner of Police Shree Mahapatra Saheb and the men of his striking force remained present before the Commission. The men of the Commission visited the areas of Makervad and Kachwada. At that time, the instigating behaviour of advocates, who were present there to defame P.I. Shri Yadav Sahen, Police Constable Shri Mahavir Singh and Police Constable Hussein Miyan forced them to return to the police station.

On 22.04.1985, the men of the Commission again came

for the investigation and started their procedure from Chhabila Hanuman at 8.30. At that time I and the Police Constable Praveensinh Himatsinh were present with Deputy Commissioner of Police Shri Mahapatra Saheb for the bandobust. Because of the curfew relaxation in this area between 10 to 12, the mob was feared to gather and so Mahapatra Saheb instructed to sum up the procedure soon and to leave but MLA Shri Ashok Chandulal Bhatt, Corporator Shri Harin Pathak and Shri Ghanshyam Mehta, Shri Nansha Chhotalal Thakor, and Babubhai Thakore and writ petitioner Shri Mayur Natwarlal and their men were present in the proceedings of the Commission. All of them and specially Ashok Chandulal Bhatt engaged the officers of the commission under the pretext of showing various places and took them to Bhrahmapuri Ni- Pole, Pakhali Ni Pole for tea. People started gathering after the relaxation in curfew at 10”O clock and approximately 1000 people were gathered. After Shri Mahapatra realized that more people would gather and create trouble, he told the members of the commission to stand up but had did not happen and therefore feeling the need of deployment of additional force, I and police constable Pravinsinh and Himmatsinh were informed to go to police station and to call the armymen or other Policemen. So I and police constable Pravinsinh left that place to call other policemen and could not find out other policemen. So we

went to Astodiya Police Station and inspector Shri Yadav was present in the police station. He was informed that additional policemen are required for the bandobust of men of Commission and Shri Mahapatra demanded the deployment of more people. Therefore, he told me to take SRP and Home Guard personnel from reserve. I along with Head Constable Sitaram Dhade of SRP Group No.7 and their three men and Ratiram Manruram Yadav of Home Guard and other four men of Home Guard and Head Constable Laxmanbhai Jamabhai working in Astodia Police Station and Police Constable Pravinsinh went to Shri Mahapatra and started going towards Brahmpuri-ni-pole via Raipur Darwaja, Chhabila Hanuman, Pakhali Ni Pole and there was a mob of about 200 to 250 people near the corner of Chhabila Hanuman – Pakhali Ni Pole at 10.40 O'clock and above mentioned people were also present in the crowd. These people were provoking the men of the crowd and they were shouting Khun ka Badla Khun Se Lenge" and `police na Tukda karo'. As we turned towards Brahampuri pole where Shri Mahapatra and members of Commission were present and suddenly mob attacked with us with the weapons of dhariya, pipes, gupti and Ratiram Manruram was attacked by Vijay Lamba with Dhariya and he sustained injuries on the elbow of his right hand. On hearing the screaming of H.C.Ratiram, H.C.Laxmanbhai intervened to rescue him. Kiran Jayantilal stabbed gupti to Laxmanbhai

Jamabhai which penetrated in his body and the front portion of gupti came out from his body. We also intervened to save both these men and Kiran Jayantilal - the person who stabbed gupti, Vijay Lamba – the person who attacked with dhariya and Paresh Pandurang Dhanorkar – who had cycle chain and who attacked with that chain before Kiran Jayantilal stabbed to H.C. Laxmanbhai. We nabbed that man and handed over to SRP personnel who were with us and injured Home Guard Ratiram went to Astodia Police Station by foot and H.C. Laxmanbhai was helped to sit in the rickshaw No. GTS 1398 and PSI Shri Brahambhatt and Vasava of Astodia Police Station rushed to the site after they came to know about the incident and army men also came there and they told that this area was under control. He told not to nab anybody and above mentioned men of SRP with me held those three men. After realizing that they would fight among themselves with their weapons, they released those captured. At that time, Ashok Chandulal Bhatt, Rahin Pathak, Nansha Thakore, Mayur Dave, Dhruv Kumar Vyas, Madhukar Vyas were present with the military and these men were shouting provoking statements that `Khun Ka Badla Khun Se Lenge" and Police Na Katka Karo'. This injured H.C. Laxmanbhai was taken to police station in above mentioned autorickshaw and they both were taken to VS Hospital by government vehicle for medical treatment. We informed this incident to Shri Mahapatra and other high

level officials. H.C. Laxmanbhai succumbed to injuries in V.S. Hospital at 11.30 Home Guard Ratiram Manruram was admitted as indoor patient.

Above mentioned facts written by me are true and complete.

Date: 23.4.85 In Person – Police Superintendent,
Crime Branch, Ahmedabad City.

(Emphasis supplied)

3. Date: 23.4.85 – Ratiram Magaruram Yadav, age 22 years, profession private service and residence at Home Guards, Ravji no Vando, Opposite Post Office, Ahmedabad.

On being asked in person, I inform that I am originally from village Mahimapurdi, Jonpur Taluka, Zonpur District of Uttar Pradesh. We are three brothers. The eldest brother's name is Rajaram, who is looking after farming at my village. The second brother's name is Sitaram. I have no sister. My father passed away about 20 years back. My aged mother lives with my brother. In my village, we have two to three bigha land between three brothers. As the land is not enough to maintain our joint family, I am living in Ahmedabad for the last six years. There are many people from my native living here. I am married and I have a one year old son, who lives in my native. Here in Ahmedabad I am living with Rajendraprasad Yadav, serving in New Textiles, living along with his family and children. I came here as he called for me and I am living here for the last six years. For the last one

year, I have been serving in a weaving factory located at Shop No.96, Adarsh Estate, Rakhial. I get Rs. 700/- monthly salary. Before this, I was working in a factory in Vasant estate. Now I am working there along with this job. I have passed SSC. I go to my job from 3.00 p.m. in three shifts in the factory. 14 people work in each shift. I am serving in Home Guard for the last six months and I am given a uniform from Home Guard for the duty. I go on duty wearing this uniform. In Home Guard, I am working in Bapunagar Battalion No.2 and my Home Guard Badge No. is 263. My Office is situated at Maleksaban Stadium and from there our service is distributed.

Since last month, that is from 20.3.85, 50 men of our battalion are sent to Astodiya Police Station for duty. The members of the battalion I belong to are assigned the duty from 7.00 a.m. to 1.00 p.m. After it other Home Guards come to relive us. We come on duty in uniform and helmet with a stick.

From 20.3.85, I am on duty in Khadiya. Therefore, I know the residents and leaders of Khadiya who come to Astodiya Police Station and sit with the policemen by name and face.

Yesterday on 22.4.85, I came for my duty at Astodia

Police Station at 7.00 a.m. as per my routine. There Shri Modi, a Home Guard Officer, allotted out duty. Along with four other men, I was kept as reserve at the police station. Approximately at 10.30 Shri Modi who is our Home Guard Officer was told by the police station to sent five men of Home Guards along with the policemen at Pakhali ni pole. So I and other Home Guards - Kantilal Raghuram Pandya, Jivanbhai Govindbhai Chauhan, Mahesh Pattani, Rakesh Vaghari and Head Constable Laxmanbhai Desai went the main road near Chhabila Hanuman towards Pakhali ni pole. At this time, there was a crowd of about 200 people. In the crowd I saw these people; Ashok Bhatt who is an MLA of BJP, Harin Pathak who is Municipal Corporator and lives in Kodh ni pole. I have been on duty at the residence of Ghanshyam Mehta who is also a Municipal Corporator and used to come to Harin Pathak's residence. I know Mansha Thakor as he used to come to Astodia Police Station now and then. Dhruv Kumar Vyas and Babubhai Thakor also used to come to Astodia Police Station frequently, so I known them. These people were standing with the mob and were provoking them saying that if policemen come into the pole, beat them. At that time, Vijay who is tall, came in the Pakhali ni pole and hit me on my right hand elbow with a sickle. As it started bleeding, I shouted. At this time, Laxmanbhai who was in civilian dress, rushed to me and asked me what happened. When he was asking me, Paresh

who has an ice cart and who also drives rickshaw, wounded Laxmanbhai with a sharp weapon called gupti. As he was wounded, he bent down. Despite this, Kiran Jayantilal wounded him with a gupti and he felt down there. As there was much crowd and other Home Guards who were with me had run away, I am ran away from there and reached to the police station. Laxmanbhai was also brought to the police Station in rickshaw.

Laxmanbhai and I were taken to the V.S. Hospital for treatment. I came to know that Laxmanbhai had died and I was admitted in the ward for treatment. I had eight stitches on the elbow of my right hand. I am discharged today and instructed to come for OPD on Thursday and take medicine from outside.

I go for duty in the area of Raipur Khadiya of Astodiya Station for the last one month. Stones and burning jumps were thrown at policemen and Home guards there. Often it became difficult for us to save ourselves. I am submitting my blood soiled clothes, that is my Home guard uniform.

I read the statement and my statement is true and proper.

Date: 23.4.85 In person – Police Superintendent

Crime Branch, Ahmedabad City.

(Emphasis supplied)

17 It is pertinent to note that complainant Mr. Mahapatra in his complaint i.e. FIR in para-5 admits that accused No.1 Ashok Bhatt was along with the Commission and with him at the time of commission of offence and they were at in Brahmpuri Pole. When this material is assessed as per the principles of law above noted and if the judicial mind is applied in a manner unvarnished, uninterferred, untouched, unsifting, unweighed, unmarshalling without making any inquiry to the materials placed, it discloses on bare reading that there are two views emerging from the prosecution case itself containing in the material produced by the police under Section-173 of the Cr.P.C. In the prosecution case itself, which is not the defence plea of alibi, it clearly emerges through the statements of A.R. Thaker, B.R. Acharya and from the FIR filed by Mr. Mahapatra that on 22nd of April,1985, in pursuance of the directions of the High Court, Mr. Mahapatra, Mr. B.R. Acharya , Mr. A.H. Thaker, Advocates Mr. H.L. Patel, Mr. B.C.Patel, Mr. Babubhai Thakore and Mr. Nansha Chhotalal Thakor, Mr. Ashok Bhatt, accused No.1 – petitioner herein and Mr. Harin Pathak – accused No.4 petitioner herein at 10.30 a.m. entered Chhar Sheri in Pakhaali's pole and noted the damages to the houses of citizens. Meanwhile, the curfew was relaxed at 10.30 a.m., all these persons reached near Dehla and took photographs of scooter lying there. At that juncture, one person named as Jayantilal and resident of that area, who was familiar to Mr. A.H.Thakar, Joint Registrar of this

Court, invited all these persons to have tea at his house. So, all these persons including accused No.1 Mr. Ashokbhai Chandulal Bhatt, accused No.4 Harendrakumar Ramchandra Pathak and Joint Registrar and Additional Registrar stayed at the house of Mr. Jayantilal for taking tea. They took half an hour approximately in the house of Mr. Jayantilal and thereafter this team when came out, noticed that people were gathered due to relaxation in curfew. So, Mr. Mahapatra, advised the Team not to proceed because in the area mob was gathered and so the team entered in Sidi ni pole from a narrow galli and from which through a road this team reached at Raipur Darwaza. Near this Raipur Darwaza, there is Astodia Police Station. Mr. A.H. Thaker, Mr. B.R. Acharya and Mr. Mahapatra entered in the Police Station while Mr. Ashok Bhatt – accused No.1 and accused No.4 Mr. Harin Pathak parted the team near this Raipur Darwaza and Astodia Police Station. At that time, it must be about 11 O' clock. If the evidence of these witnesses are taken on its face value, it indicates that the whole team at 10.30 entered in the house of one Jayantilal for taking tea and stayed there for half an hour and thereafter they walked on some distance and noticed that mob of gathering, came to Raipur Darwaza and Astodia Police Station. There accused No.1 Ashokbhai Chandulal Bhatt and accused No.4 Harendrakumar Ramchandra Pathak parted the company of these witnesses and, therefore, it must be inferred that at about 11.00 a.m. accused No.1 and accused No.4 parted the company of the Commissioner and Mr. Mahapatra. As per the prosecution case, the

incident took place near Chhabila Hanuman, outside Pakhali ni Pole, which is at distance from Astodia Police Station and Brahmpuri Pole and as per the prosecution case the incident took place at about 10.40 while a set of material as taken into consideration on its face value indicates that the accused No.1 and accused No.4 right from 10.00 a.m. to 11.00 a.m. were with Mr. A.H. Thaker, Mr. B.R. Acharya and Mr. J. Mahapatra at Brahmapuri Pole i.e. Somewhere else than the scene of offence. The second set of material in shape of the statements of above three police constables indicates that accused No.1 and accused No.4 were in the crowd near Chhabila Hanuman much away from Brahmpuri Pole, instigating the crowd to attack the police personnel. This position leads to the situation that while assessing the material even as per the directions of the Supreme Court in State of Orissa vs. Debendra Nath Padhi, one set of material is contradictory to other set of material so far as it relates to the presence of Accused No.1 and 4 at the scene of offence is concerned and prosecution relies upon both the set of material produced by it. True it is that, meticulous examination of materials placed on record by the police is prohibited. Sifting and weighing of the material, as is done in the trial, is also prohibited. Even then, as aforesaid, courts cannot decided judicial matters in abdication of duties cast upon courts when salient provisions like Section 227 of the Code of Criminal Procedure is engraffed in statute by Legislatures. This is peculiar kind of case where in prosecution case itself one view clearly appears that the accused No.1 and accused

No.4 were not present at the scene of offence at the time time when the crime committed, while in prosecution case itself second set of material clearly establishes that accused No.1 and accused No.4 Mr. Ashok Bhatt and Mr. Harin Pathak were somewhere else at the time of committing the crime alleged against them. This is not the case of considering the defence plea raised by the accused. If the standards which permits sifting and weighing of material at this stage by the courts is not applied, it becomes clear by bare reading by applying simply judicial mind that there is paradox in the material that prosecution proposes to adduce during trial as the evidence. The other contradictions pointed out by learned counsels for the petitioners in the material produced even if ignored, the fact remains that, there are two views or two sets of materials glaringly stares at the face of court at the stage of deciding the matter under Section 227 and under Section 228 of the Criminal Procedure Code. In situation like this, the decision of Apex Court in the case of Union of India vs. Prafulla Kumar as reported in AIR 1979 SC 366 would help in deciding the controversy which has arisen in the present case. Third test laid down by the Apex Court in the decision in Para-10 clearly says that when the court has to ascertain a prima facie case, the same would naturally depend upon the facts of each case and no universal application of rule can be laid down. It is further held that by and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion

against the accused, he will be fully within his right to discharge the accused. While in test (iv) it is clearly laid down by the Apex Court in the said decision that in exercising his jurisdiction under Section 227 of the Code, experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. Though the Judge is not permitted to enter into roving enquiry into the pros and cons of the matter and weighing the evidence as if he was conducting a trial.

18 This Court does not propose to enter into roving inquiry and weigh the evidence as is done in the trial, but when the material is simply read, there are two views, as aforesaid, destroying the other to the extent that from the material produced under Section 173 only some part could stand and other would not.

19 In this peculiar situation, one more decision of the Apex court in the matter of NIRANJAN SINGH KARAM SINGH PUNJABI vs. JITENDRA BHIMRAJ BIJJA, as reported in AIR 1990 SC 1962, wold also be helpful. In para-7 it is clearly observed by the Apex Court that the Court may for the limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

20 Now without entering into even sifting or weighing the evidence even to the extent of permitted scope, it clearly appears that the material which is produced by police under Section 173 of the Code of Criminal Procedure so far as it concerns accused No.1 Mr. Ashok Chandulal Bhatt and accused No.4 Harendrakumar Pathak is opposed to the common sense and broad probabilities of the case. This is so because it is not permitted for the courts to rely upon some materials only and come to the conclusion to frame a charge. It becomes the duty of the court to consider the wholesome material. It is, therefore, not permitted to take into account the statements of above three police constables only and to come to the conclusion that there is grave suspicion of committing crime against these two accused and that though there exists contradictory material in prosecution case itself, the same should not be considered. This is exactly done by the Trial Court. The Trial Court after relying upon a decision of the Apex Court in the matter of State of Maharashtra vs. Priya Sharan Maharaj, as reported in 1997 SCC (Cri) 584, came to the conclusion that if the statements of three police constables are taken into consideration, this case is fit for framing of the charge against the accused and improvements, improbabilities and contradictory statements will have to be seen only at the time of conclusion of trial. It may be noted that in the said case of State of Maharashtra vs. Priya Sharan Maharaja (supra), it is observed by the Apex Court that at the stage of framing of the

charge the court is not required to undertake an elaborate enquiry in sifting and weighing the materials to arrive at the conclusion that it will not lead to conviction and it has been held that the court erred in seeking independent corroboration. Relying on this, the learned Trial Judge observed that it was not permissible for the court to take into consideration the statements of Commissioners appointed by this Court, but the total materials on records should be considered and statement of police personnel cannot be thrown away outright only on the ground that they are contrary to the statements of Commissioners appointed by this Court. Going through the decision of the Trial Court, it gives an impression that ultimately the Trial Court relied upon three statements of police constables and came to the conclusion that there was prima facie case to frame the charge against these accused.

21 In my humble opinion, though the Trial Court has observed that wholesome material has to be taken into consideration, but ultimately, the Trial Court relied upon the statements of three police constables and brushed aside the statements of Commissioners appointed by this Court. In fact, in such circumstances, the intention of the Legislature as has been envisaged in Section 227 of the Code of Criminal Procedure has to be judged meaningfully. If the statements of three police constables are taken as a gospel truth, then the remaining material, which is also a prosecution case in shape of the statements of the Additional

Registrar and Joint Registrar including First Information Report would render nugatory. The decision of the trial court is accepted, it comes to that, what is stated by the three police constables is true while rest of the evidence or material though it is the prosecution case, is untrue. In fact, this is not permissible and, therefore, in various decisions rendered above, the Apex Court has observed that a judicial mind has to be applied and the courts are for the limited purpose permitted to shift and weigh the evidence and material produced by the police.

22 In fact, the present case, so far as it stands against accused No.1 Ashokbhai Chandulal Bhatt and accused No.4 Harendrakumar Ramchandra Pathak is concerned, is governed by two decisions of the Apex Court i.e. (i) in the case of Union of India vs. Prafulla Kumar Samal, as reported in AIR 1979 SC 366, and (ii) in the case of Dilwara Balu Kurane vs. State of Maharashtra, as reported in (2002) 2 SCC 135. In both these decisions, the Apex Court has taken care of the situations arising from the facts like the present case. In both the cases, it is amply stated by the Apex Court that prima facie if two views are equally possible and if the Judge is satisfied with the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused in exercising jurisdiction under Section 227 of the Code of Criminal Procedure. The courts are not the mouth-piece of the prosecution. What is against the broad

probabilities of the case and against the evidence must not be accepted by the courts. Applying the ratio laid down by the Apex Court in these two decisions, it clearly appears that the facts of this case so far as it concerns to accused No.1 and accused No.4 is much far away from the arena of even suspicion much less grave suspicion. This is a case wherein the prosecution material itself destroys its counterparts. In such situation, the courts are instead of entering into the inquiry, sifting and weighing the material to the limit permissible, may come to the conclusion that when the material is opposed to the broad probabilities of the case and the commonsense, such accused should be discharged. This is a question and pivot of the case as to whether accused No.1 and accused No.4 were present at the scene of offence at the time of committing of the crime. Prosecution itself relied upon two circumstances in this respect. One is in negative and the other is in positive. Both cannot stand together. This Court cannot enter into a roving inquiry what is truthful and what is not. Out of the materials produced by the prosecution, when two views are equally possible, it could be said to the extent that there are two views diametrically against each other, the matter would not even remain in the region of suspicion against the accused. The better course and the judicial course, perhaps, in such situation, is to discharge the accused instead of putting them to the arduous trial. In my humble opinion, this could be the meaningful implementation of the intention of the Legislature wisely manifested under Section 227 of the Code of

Criminal Procedure.

23 True it is that, at this juncture, it is not to be seen by the courts whether material produced would result into conviction or not and when a grave suspicion arises in the mind of a Judge as to the commission of a crime by the accused, the accused must be put to trial. At the same time, it is observed as laud judicial thinking, as a obiter dictum that it would not be impertinent to note that if the material produced by the police before the court taken at its face value, even without cross-examination, it might result in acquittal of the accused. In such circumstances, would it be proper to put the accused on trial and, therefore, as a obiter dictum, it may be observed that, supposed, if accused No.1 and accused No.4 are with this material if put to trial, what may be the effect of the same. There, the cardinal principle is when two views are possible, a view favourable to the accused must be adopted at the end of the trial by the courts. Therefore, supposing that if this material is taken to be the material of trial without any cross-examination, the question which may be posed is whether would this material result into conviction of the accused No.1 and accused No.4. It is made clear that only for the limited extent that, in my humble opinion, the material produced by the police under Section 173 of the Code of

Criminal Procedure, so far as accused Nos. 1 and 4 is concerned if weighed and sifted, on account of material destroying each other, takes the case out of the region of even suspicion.

24 Therefore, the Trial Court erred in not taking into consideration wholesome material and failed to exercise jurisdiction conferred upon it to weigh and sift the material to the permissible extent instead of accepting part of material incriminating the accused and brush aside the part of material exonerating the accused from the commission of the crime. It is also true that, ordinarily, in the Revision Applications, the High Court is not interfering in the discretion used by the Trial Court for the framing of the charge unless glaring illegality and injustice stares at the face of the court. I humbly believe that not taking into consideration the whole material which discloses two contradictory views and without adverting to such material, the learned Trial Judge failed to exercise jurisdiction vested in it and, therefore, glaring injustice and illegality is staring at the face of the court. It must be noted that at this stage circumstances are not such like as indicates something like benefit of doubt at the conclusion of the trial, but this is a case in which circumstances indicates exoneration which would be like something clear acquittal at the conclusion of the trial and, therefore, the proper order would be under Section 227 of the Code of Criminal Procedure and not under Section 228 of the Code of

Criminal Procedure. Learned P.P. Mr. Oza as well as Mr. Gupta with all vehemence pressed into service the decision of the Apex Court in the matter of STATE OF MAHARASHTRA vs. SOM NATH THAPA, as reported in AIR 1996 SC 1744 especially Para-57 of the decision is sought to be relied upon. As per the facts in respect of Mr. Som Nath Thapa in that case, two witnesses made contrary statements before the police at different time and they were Inspectors. The fact discloses that those Inspectors made some statements at one time and subsequently made contrary statements before the police and for discharge when accused sought to rely upon these statements, the Apex Court stated that the probative value of the statements cannot be gone into at the stage of framing of the charge. Now, the argument is even there be contradictory statements, it could not be seen at this stage. This argument cannot be accepted for simple reason that going through the decision cited by the learned Counsels, there was ample evidence against accused Som Nath Thapa which is depicted by the Apex Court right from para-51 and secondly in this case, the question is not of attaching any probative value to any statements. The issue arises in this case is even without attaching any probative value to any of the statements, two views arise destroying each other and not equally possible. Therefore, the reliance placed on this decision cannot be helpful to the prosecution.

25 So far as accused No.1 and accused No.4 is concerned,

now material is required to be seen in respect of the allegation under Section 120-B of the Indian Penal Code. Learned PP Mr Oza as well as learned Advocate Mr. Gupta by all vehemence have stated that irrespective of the presence of the accused No.1 and accused No.4 at the scene of crime, they are amply charged for conspiracy. When the First Information Report is read and evaluated, it indicates that the whole case against accused No.1 and accused No. 4 is made out on the basis of conspiracy than on the basis of the presence of the accused at the scene of crime, instigating the crowd to take revenge against police personnel. While again without assessing or weighing material in this respect, if the material produced is considered fully, the charge of conspiracy appears to have been saddled against these two accused on three grounds, namely, (i) the complainant felt and it was his individual opinion that what had been occurred near Chhabila Hanuman was at the instance of accused No.1; (ii) the prosecution relied upon the material incorporated in the First Information Report indicating that to commit a crime near Chhabila Hanuman, accused No.1 made to wait the Commissioner and party to take tea at the house of Jayantilal, so a murder can be committed near Chhabila Hanuman and that it is incorporated in the FIR that accused insisted that the committee and team should return through Chhabila Hanuman route, and (iii) the next circumstance is relied upon in the statement of Major A.K. Sinha wherein he has stated that at the instance of accused No.1, on 22nd of April, 1985 the curfew was relaxed and that

the murder of Laxmanbhai Jamabhai was committed. This is all the circumstances relied upon by the prosecution in the material produced under Section 173 of the Code of Criminal Procedure to saddle these two accused for the charges under Section120-B of the IPC.

26 Without evaluating the material, it must be noted that the criminal conspiracy is said to have taken place only when two or more persons agree to do or cause to be done illegal act or an act which is not illegal by illegal means, then such an agreement is designated a criminal conspiracy. Therefore, there should be a meeting of mind between the accused to do an illegal act or any act by illegal means, that is to say that there should be some evidence of such agreement of sharing and passing of thought to commit a crime. A few bits here and few bits there on which a prosecution might be relying cannot be held to be adequate for charging even prima facie case with the agreement of conspiracy. It has to be prima facie shown that all means adopted and illegal acts done by the accused were in furtherance of the object of conspiracy hatched. There has to be cogent and convincing material against each of the accused charged with the offence of conspiracy. True that conspiracy itself in such a secret act that there cannot be any direct material available but there should be some material indirectly to infer that there was meeting of mind between the accused to commit the crime. Therefore, even to charge the accused with the

offence of conspiracy, some kind of physical manifestation of agreement is required to be established. Mere agreement is not sufficient, but mens rea in meeting of mind, in agreement of two persons must also be established even indirectly.

27 In this case, the material on which prosecution relies is so vague that it could not be inferred even prima facie that there was a meeting of mind and agreement between accused No.1 and accused No.4 and other accused to commit a crime near Chhabila Hanuman to attack police personnel. Except FIR, there is nothing on the record that accused No.1 even indirectly attempted to detain the Commissioner and his team to take tea. On the contrary, the prosecution case is that one Jayantilal who was known to witness A.H. Thaker, Joint Registrar of this Court, voluntarily invited the whole team to take tea and since Mr. Thaker accepted the invitation, the whole team took tea at the house of Mr. Jayantilal. Though there is no prima facie case on the part of accused No.1 to detain the Commission at Brahmpuri pole. Only because accused No.1 and accused No.4, etc. preferred a writ petition against police officials, would not result even into prima facie inference that they hatched a conspiracy to commit murder of police constable. Not only that, the return route of the Commissioner and his team was set out by Mr. Mahapatra, complainant, and not by accused No.1 Ashokbhai Chandulal Bhatt. This is very clear by the statements of the Commissioner and his accompanying persons. Only because

accused No.1 requested Mr. A.K. Sinha, Major of the Army to relax curfew for some hours and he relaxed curfew, would not permit a far reaching inference that there was meeting of mind between accused No.1 and other accused to hatch a conspiracy to kill any police personnel. Explanation is offered in the manner that accused No.1 and accused No. 4 being leaders of the area and there was continuance of curfew, it was necessary to relax curfew for some hours to purchase essential commodities like food, milk etc by the citizens of that area. There is not even remote indirect material to infer that there was a conspiracy amongst the accused to the extent of meeting of mind and agreement to hatch conspiracy. The circumstances pointed out by learned PP Mr. Oza are not the circumstances even remotely manifesting the existence of agreement to do illegal acts on the part of accused No.1 and accused No.4. In the matter of STATE OF KARNATAKA vs. L. MUNISWAMY, as reported in AIR 1977 SC 1489, in this respect the Apex Court observed in para-8 that so far as the offence of conspiracy is concerned even if the accused were meeting to each other, it was necessary to produce material as to why the accused met, what they said, and whether they held any deliberations at all. It is noteworthy that the material which is indicated by learned PP is not material any way connected between the meeting of an accused with the other. On the contrary, materials suggesting that what is expressed by one of the accused is made the basis of conspiracy. Expression of an accused or opinion or request made by him, cannot

be stretched so far as to infer that the request, expression or opinion was the result of meeting of mind with other persons, but as observed by the Apex Court in the matter of State of Karnataka vs. L. Muniswamy (supra), there should be some evidence as to meeting of mind between the accused. The decision cited by learned PP Mr. Oza and Mr. Gupta on this aspect are on the facts of those cases and may not be helpful to the prosecution. Therefore, at this stage, even evaluating the material against accused No.1 and accused No.4 for the charge of conspiracy, it clearly appears that there is no prima facie evidence even remote and indirect to infer that accused No.1 and accused No.4 hatched conspiracy to commit murder of police constable.

28 In the result, this Criminal Revision Application No. 474 of 2001 is allowed qua petitioner No. 1 Ashok Chandulal Bhatt and the order impugned rejecting his discharge application passed below Exhibit 56 stands quashed and his application for discharge stands allowed and he is discharged in Sessions Case No. 178 of 1986 for all the charges levelled against him and Rule is made absolute to the above extent only. While Criminal Revision Application No. 474 of 2001 stands dismissed against petitioner No.2 and accused No.8 Mayur Natwarlal Dave and Rule stands discharged. Like wise, Criminal Revision Application No. 486 of 2001 is also allowed and order impugned in this Revision Application

passed below Application Exh. 56 in Sessions Case No. 178 of 1986 so far as accused No.4 Harendrakumar Ramchandra Pathak concerned is set aside and accused No.4 Harendrakumar Ramchandra Pathak is discharged from the charges levelled against him in Sessions Case No. 178 of 1986.

29 This trial has travelled two decades to reach to this stage and, therefore, the Registry of this Court is directed to transmit back the Record and Proceedings of the trial court immediately to proceed with the trial against other accused.

(J.R.VORA, J.)

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